IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPEALLTE JURISDICTION.

CRIMINAL APPEAL NO. 656 OF 1997

Smt.Rekha Jaysingh Kurhade..... ....Appellant.

(Orig.Accd.)
V/s

The State of Maharashtra ... . Respondent.

Mr.A. P. Mundargi, Adv. for the appellant.

Mrs.P.H. Kantharia, APP for the respondent.

CORAM: V.G. PALSHIKAR
AND
R.C. CHAVAN, JJ.

6th July, 2005.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Thane in Sessions Case No.455 of 1987 on 24.10.1997 the appellant-accused has preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of the learned advocate for the appellant and the learned Public Prosecutor for the respondent we have scrutinized

the entire evidence on record and reappreciated the same.

3. The prosecution case stated briefly is that the accused Rekha had three daughters from her marriage with P.W.1-Jaysingh Kurhade. On 14.8.1986 one Yashoda Karande informed the police that the accused and her three daughters were in unconscious condition in their house. They were removed to hospital at Vashi. All the three daughters died and the accused survived. The police conducted investigation and arrested the accused on 15.2.1987 on the charge of having murdered her daughters and having attempted to commit suicide herself by administering poison and drinking it to herself. The accused was accordingly charged under section 302 for murder of daughters and section 309 for attempt to commit suicide. The prosecution examined in all nine witnesses to prove its case. The learned trial Judge on appreciation of evidence came to the conclusion of guilt and convicted the accused as aforesaid. The appeal is directed against this order of conviction.

4. Shri Mundargi, learned counsel appearing on behalf of the appellant, submitted that the incident is really unfortunate but the evidence on record as it stands completely fails to bring home the guilt of the accused in committing murder of the victims or attempting to commit suicide herself. According to the learned counsel all witnesses

have been declared hostile by the prosecution. Medical evidence regarding death due to poisoning undoubtedly is there but there is no evidence to prove that this poison was administered by the accused. The circumstances proved on record even if accepted completely fail to give rise to an inference of guilt of the accused and therefore according to the learned counsel the accused is entitled to be acquitted. This contention was stoutly opposed by the additional public prosecutor Mrs.Kantharia who relying on several portions of evidence contended that none else than the accused could have administered the poison to the victims. She therefore prayed that the order of conviction be maintained. We have to consider these rival contentions in the light of evidence as it stands on record.

5. P.W.1-Jaysingh Kurhade is the unfortunate father of the three victims and husband of the accused. He has deposed that he is vegetable merchant and as such was habituated to leave his house around 2.00/3.00 in the morning everyday for conducting his business of vegetables at Byculla market. According to him on the date of incident as usual he left the house around 2.30 a.m. And it was at about 2.00 p.m. that he was informed by his nephew (son of his sister) that the daughters have expired and the accused is seriously ill. He therefore went to Vashi, saw the daughters and came to Sion hospital to his wife. That is all that he has said in his examination in chief. He

is cross examined where he admits that the door of the house used to remain open always after his leaving early in the morning. What he has said is liable to be noted verbatim :

> " Myself and my wife loved to my daughters. Myself and accused never felt ill for not giving birth to a son by my wife. The accused had also never expressed her wish for giving birth to three daughters and not giving birth to a male child. My house at Turbhe was on the road surrounded by many houses. The road which goes from in front of my house is busy with traffic from the early morning till night. It is true that the door of my house was remaining open from 6.00 a.m. Till 11.00 p.m. It is true that many children and grown up inhabitants from my locality used to come inside my house."

The fact that the house was accessible to anybody is thus obvious. It is also obvious from this evidence that it is not any person who could have entered but any animal also could have entered the premises.

6. P.W.2-Sushila Gadhave is real sister of P.W.1-Jaysingh and she has stated that on 14.8.1986 at about 10.30 a.m. while she was going to school to bring her son she saw gathering of people in front of the house of the accused and she went there and saw that all the three daughters as also the accused were lying unconscious. She therefore

took all the four to Jijamata hospital. At this stage the witness was declared hostile and was cross examined. All that has been proved by this witness even if the hostility is ignored is that around 10.30 a.m. she saw the victims and the accused lying unconscious in their house when she went at the spot. The witness has denied the suggestion that it was she who was then unconscious. Both she and P.W.1-Jaysingh have categorically stated that none of the family was unhappy over the fact that the accused delivered only female children.

7. P.W.3-Pushpa Singh is neighbour who has similar story to tell. She says that at 9.00 a.m. or thereabout on 14.8.86 when she came out of her house she saw people gathered in front of the house of the accused and when she went there she saw three daughters and the accused lying unconscious. One of the victims was having froth at the mouth, they were shifted to hospital where they died. This witness also is declared hostile. Again ignoring the hostility all that can be said to have been proved by this witness is the fact that when she went to the scene of offence at 9.00 a.m. the victims were unconscious. What is pertinent to note at this stage is the fact that this witness saw them at 9.00 a.m. and says that she along with others shifted the victims to hospital when P.W.2-Sushila says that she saw the incident at 10.30 a.m. and took the victims to the hospital. The time lack is not wholly negligible. It creates doubt as to exactly at what point of time the

occurrence of poisoning was detected. All suggestions in his cross examination by the prosecution are denied. She denied to have made statement to the police about involvement of the accused.

8. To the same effect is the evidence of P.W.4-Anusaya Pingle who was also declared hostile. We need not repeat that she also saw the incident around 10.30 a.m. P.W.5-Tanaji Pingle who used to deliver milk packets to the house of accused everyday and has stated that in the morning of 14.8.86 he kept the packet of milk at the door step of the victim and the accused. He was also declared hostile. It is however pertinent to note that suggestion made by the prosecution was that the milk packet was received by the accused herself and she closed the door thereafter. This suggestion however is denied. He has denied to have said anything of this kind to the police. From the deposition of this witness it is clear therefore that according to the prosecution milk packet was received by the accused herself in the morning. Assuming this to be correct even though the witness has specifically denied to be so, it is so that the accused and the children were alive at that time. P.W.6-Dipa Jadhav is another witness who saw same thing on 14.8.86 at 10.30 a.m. She is declared hostile. Even otherwise there is nothing in testimony of this witness which can be of any use to the prosecution. P.W.7-Shashikala Nerulkar is same as P.W.6 and has been declared hostile. All the documents tendered by

the prosecution were admitted on behalf of the accused and therefore they were exhibited. They include post mortem report. The post mortem report of Rupali discloses that the time of death was mentioned as prior to 11.35 and no definite time can be ascertained. It then speaks of inability to give any reason to doubt the death and expresses doubt that it was due to poisoning. The inquest panchnama of all the three deceased discloses that the cause of death could not be ascertained or known by the police therefore bodies were sent for post mortem. The post mortem report does not therefore give any definite cause of death. It is suspected case of poisoning. How poison was administered, what was the poison and how it was administered is not know. Since the post mortem reports were accepted by the defence the doctor is not examined. There is therefore no evidence on record to explain the exact manner in which the death occurred. Even it is assumed that the death occurred due to poisoning it could have occurred due to several circumstances none of which are on record. The poisoning could have occurred because of consumption of contaminated milk, the milk could have been contaminated when delivered or could have been contaminated thereafter. Thus there is no certainty of any manner as to how poisoning took place and who administered the poison. P.W.8-Yashodabai Karande is again hostile and her evidence is same to the effect as other hostile witnesses. The

investigating officer has narrated how he conducted the investigation and proved the statements recorded by him. It is in the state of this evidence that the learned trial Judge has recorded finding of conviction and convicted the accused as aforesaid.

9. Even if we accept the entire evidence as correct yet the prosecution has failed to prove all the circumstances which must be proved before conviction came to be recorded under section 302 or affirmed in appeal. All that has been proved by the prosecution is:

> i) death of three persons by poisoning, accused affected by poison;
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> ii) post mortem report discloses that the death was caused due to poisoning but does not give any clue as to what was the matter which poisoned these persons and how it was administered and or how it could have been administered;
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> iii) that milk was delivered in the morning of that day to the house of the accused;
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> iv) that the time of death was any time prior to 11.00/11.30 a.m. on 14.8.86. The accused herself was also affected by the poisoning.

In order to sustain a conviction on these circumstances and circumstantial evidence which was essential for the prosecution to prove that it was the accused alone who administered the poison or that poison was administered by the accused in any manner is absent. Circumstances must exclude the possibility of natural poisoning that is to say by consumption of some poisonous substance directly or via

milk by all the persons, such circumstance is not proved on record by the prosecution.

10. The entire prosecution evidence, if accepted, goes to show that at the time when the incident occurred as seen by the people around including all the hostile witnesses all the four were in unconscious condition. The prosecution has therefore failed to rule out the possibility of poisoning due to something else than administration by the accused. The evidence on record hopelessly lacks in this regard. In such circumstances the benefit must go to the accused. In our opinion, prosecution falls short of proving beyond doubt that the death was caused by the accused by administering poison. In the circumstances the order of conviction, in our opinion, is unsustainable. The same therefore deserves to be set aside and is accordingly set aside. The appeal succeeds and is allowed. The appellant-accused is already on bail. She is acquitted of all the charges leveled against her. Her bail bonds are canceled.